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No. 81-2313

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

AVENUE BOOK STORE,

Petitioner,

-vs-

CITY OF TALLMADGE, OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

Brief In Opposition

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I

QUESTIONS PRESENTED

Should the Supreme Court of the United States accept jurisdiction where a State Court grants a permanent injunction against defendant enjoining him from utilizing the rear portion of its store for the exhibition, display or sale of materials which display or depict sexual conduct (activity) that is obscene as defined by State law and as interpreted by State Courts?

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OPINIONS BELOW

The judgments of the Ohio Supreme Court dismissing petitioner's appeal and denying rehearing are unreported and are set forth, respectively, in the Appendix at **1a,2a** . The judgment and opinion of the Ohio Court of Appeals - Ninth Appellate District, is unreported and is set forth in the Appendix at **3a-24a** . The journal entries of the Court of Common Pleas of Summit County, Ohio, the trial court, are set forth in the Appendix at **25a-27a**.

STATEMENT OF THE CASE

The City of Tallmadge, Summit County, Ohio, commenced an action for relief against defendant, Avenue Book Store, requesting among other things a permanent injunction against defendant to prevent the sale, display and exhibition of materials, that were legally obscene. The Trial Court concluded that certain materials and products within the rear portion of defendant-petitioner's store were obscene according to Ohio law; that the evidence clearly established the existence of a nuisance that is a danger to the public morals and to the community welfare; and thus issued its order granting relief.

Upon appeal by Petitioner to the Ohio Ninth Appellate District Court, such Court modified the portion of the order to be as follows:

> "(b) In abatement of the nuisance, defendant is enjoined from utilizing the rear section of the store for the exhibition, display or sale of materials which display or depict sexual conduct (activity) that is obscene as defined by R. C. 2907.01 and interpreted by the Ohio Supreme Court in State v. Burgun (1978), 56 Ohio St. 2d 354." (Appendix at 13a.).

The Court commented, being cognizant of the Vance Case:

> "Unlike the circumstances present in Vance, the present injunction, as modified by this opinion, would provide adequate procedural safeguards against impermissible prior restraints." (Appendix at 15a).

Upon appeal by Petitioner of this decision to the Ohio Supreme Court such Court dismissed the appeal for want of a substantial constitutional question (Appendix, Page 2a) and subsequently denied Petioner's motion for rehearing. (Appendix, Page 1a).

SUMMARY OF ARGUMENT

The injunction as modified by the Ohio Ninth Appellate District Court is not a prior restraint as is protected by the First Amendment to the Constitution since such protection is not provided obscene material. The Ohio Appellate Order, left undisturbed by the Ohio Supreme Court, does not present a Federal question not heretofore ruled upon by the United States Supreme Court.

There exists no conflict between the Ohio Supreme Court action in the instant case with prior Federal Court decisions. The opinion of the Ohio Appellate Court clearly enunciated the reasoning for such proposition.

The judgment of the Ohio Courts in the instant case rests upon completely adequate State statutory and judicial law.

ARGUMENT

The Petitioner would try to persuade this Court that the "Question Presented for Review" and reason to grant the writ is as follows:

> "An important question is presented, on which state and federal courts are in conflict, as to whether a court order which enjoins the future use of the rear portion of petitioner's book store for the exhibition, sale or display of unknown and unreviewed materials is an unconstitutional prior restraint in violation of the first and fourteenth amendments and, therefore, is in conflict with this court's decision in Vance -vs- Universal Amusement Co., Inc., 445 U. S. 308 (1980)?"

(See Petition Pages -i- and -9-)

The injunction as modified by the Court of appeals reads:

> (b) In abatement of the nuisance, defendant is enjoined from utilizing the real section of the store for the exhibition, display or sale of materials with display or depict sexual conduct (activity) that is obscene as defined by R. C. 2907.01 and interpreted by the Ohio Supreme Court in State -vs- Burgun (1978) 56 Ohio St. 2d 354."

Thus, the injunction is not directed to just any "unknown and unreviewed materials "but to only those materials "that are obscene as defined by R. C. 2907.01 and interpreted by the Ohio Supreme Court——". (Appendix, Page 40a See R. C. 2907.01)

The Petitioner continuously argues that this order violates his constitutional rights as guaranteed by the First Amendment to the United States Constitution. As stated in Roth -vs- U. S., 354 U. S. 476 at page 484-485, and as enunciated many times thereafter obscene material is not protected by the first amendment:

"We hold that obscenity is not within the area of constitutionally protected speech or press."

This court stated in **Nebraska Press Association -vs- Stuart 96 S. Ct. 2791 (1976) on page 2808:**

"—This Court has frequently denied that First Amendment rights are absolute and has consistently rejected the proposition that a prior restraint can never be employed. See New York Times Co. -vs- United States, 403 U. S. 713, 91 S. Ct. 2140, 29 L. Ed 2d 877 (1971); Organization for a Better Austin -vs- Keefe, 402 U. S. 415, 91 S. Ct. 1575, 29 L. Ed. 2d 1 (1971); Near -vs- Minnesota ex rel. Olson, 283 U. S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931)."

In **Southeastern Promotions, Ltd. -vs- Conrad, 420 U. S. 546 at page 557,** the Court indicated that if it found the material not to be protected by the First Amendment, then there would be no prior restraint.

Again in **Vance,** this court reaffirmed this position.

Therefore, if, in any sense, the injunction in question does act as a prior restraint, it is not such to produce the evil described by this Court in **Nebraska Press Association -vs- Stuart, 427 U. S. 539 (1976):**

"A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication "chills" speech, prior restraint "freezes" it at least for the time."

Justice White in his dissenting opinion in **Vance** noted the dangers of prior restraint:

"Prior restraints are distinct from, and more dangerous to free speech than criminal statutes because, through caprice, mistake, or purpose, the censor may forbid speech which is constitutionally protected, and because the speaker may be punish-

ed for disobeying the censor even though his speech was protected."

These dangers are completely absent in this case and under the Ohio Revised Code sections set out herein and Ohio case law a contempt proceeding is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted. Only after judgment has become final, correct or otherwise, does the law's sanction become fully operative.

It certainly cannot be argued that the Ohio Appellate order in the instant case presents a Federal question not heretofore ruled on by the U. S. Supreme Court. This Court has even ruled upon and upheld the State of Ohio "Obscenity" law, **Ohio Revised Code** Section 2907.32, (Appendix, Page 43a), when it denied a petition requesting a writ of Certiorari on May 12, 1980 in **United States Supreme Court Case No. 79-1450.**

The Defendant in that case was employed in the store owned by Petitioner in this case. On March 4, 1982, again the **U. S. Court of Appeals for the Sixth Circuit, Case No. 81-3202 (Appendix Page 33a),** wherein the same defendant sought habeas corpus; adjudged that both the Ohio Statute referred to above and the Tallmadge City Ordinances (Appendix, Page **44a**) were constitutional. Thus the United States Supreme Court, with its Appellate Court following such decision, upheld the constitutionality of the identical Ohio Statute that must be violated before Petitioner could be found guilty of a contempt. Thus, the claim of Petitioner that this is an unconstitutional violation not heretofore ruled upon is without merit.

The Petitioner herein seeks a review of this case for the stated reason that the decision of the Ohio Court of Appeals for the Ninth Appellate district is in conflict with the decision of this court in **Vance -vs- Universal Amusement Co., Inc.**, 445 U. S. 308 (1980).

The instant case is not a mirrored image of the Vance Case as the Petitioner would have us believe. The facts of the two cases are so dissimilar that this court can deny the petition and still maintain the law announced in the Vance case.

The Appellee in Vance had filed suit in the United States District Court seeking an injunction and declaratory relief to forstall any action by the County Attorney under the Texas nuisance statutes. This Court in its Per Curiam opinion stated the question therein to be:

> "—Whether the United States Court of Appeals for the Fifth Circuit correctly held a Texas public nuisance statute unconstitutional. The Court of Appeals read the Texas Statute as authorizing a prior restraint of indefinite duration on the exhibition of motion pictures without a final judicial determination of obscenity and without any guarantee of prompt review of a preliminary finding of probable obscenity."

In the instant case we are not considering a public nuisance statute or the injunctive procedures set out therein for abatement of a nuisance.

The trial court in its findings of fact and conclusions of law (Appendix, Page **28a-32a**) found that the manager of Petitioner's store had been found guilty by a jury of pandering obscenity on two different occasions and that certain materials introduced into evidence at the trial were obscene. The court concluded that the Petitioner's operation constituted a common law public nuisance and a "danger to the public

morals and to the community welfare". The court then made its order.

We are not suggesting that the law regarding prior restraint is any different when reviewing an injunction based upon a common law nuisance theory. In either instance, the system comes into court bearing a heavy presumption against its constitutional validity. **Bantam Books, Inc. -vs- Sullivan,** 372 U. S. 58, **Southeastern Promotion, Ltd. -vs- Conrad,** 420 U. S. 546. However, we do say that the decision in Vance turned upon the lack of procedures in the Texas statutes for making a final determination of obscenity after issuance of a temporary injunction against a film exhibition; and that the exhibitor had to obey the order prior to a review on the merits of the film or suffer the consequence of contempt even if the film was later determined to be nonobscene.

Such is not so in the instant case. The present injunction as modified by the Court of Appeals and when viewed in light of **Sections 2705.02, 2705.03, 2705.04 and 2705.09 of the Ohio Revised Code (Appendix, page 35a);** clearly provides adequate procedural safeguards against prior restraint.

Section 2705.02 provides in part:

> "A person guilty of any of the following acts may be punished for a contempt. (A) Disobedience of or resistance to a lawful, writ, process, order, rule, judgment, or command of a court or an officer.**(Appendix, Page 35a).**

Section 2705.03 provides in part:

> "In cases under section 2705.02 of the Revised Code, a charge in writing shall be filed with the clerk of the Court, an entry thereon made upon the journal, and an opportunity given to the accused to be heard by himself or Council——"

(Appendix, Page **36a**).

Section 2705.05 provides:

"Upon the day fixed for the trial in a contempt proceeding the Court shall investigate the charge, and hear any answer or testimony which makes or offers. The Court shall then determine whether the accused is guilty of the contempt charge. If it is found that he is guilty, he may be fined not more than five hundred dollars or imprisoned not more than ten days or both.

(Appendix, Page 38a).

Section 2705.09 provides in part:

The judgment and orders of a Court or officer made in cases of contempt may be reviewed on appeal.-----"

(Appendix, Page 39a).

Ohio Courts have ruled that if the order upon which contempt is predicated is one prohibiting the doing of an act and the act has subsequently been done, as in the instant case, such contempt proceeding is of a criminal nature and proceeding. **General Electric Co. -vs- International Union, United A. A. & A., etc.,** 118 NE 2nd 708.

There is a presumption of innocence in favor of the accused, and such presumption remains until the guilt of the accused is established beyond a reasonable doubt. **State -vs- Treon** 188 NE 2nd 308.

This would not be a "direct contempt" as defined by the Supreme Court of the United States, **In re Oliver,** 333 U. S. 257, and thus would require a full and complete hearing, the resulting decision being appealable as in any other action. **Ohio Revised Code, Sections 2705.02, et seq.** (Appendix , Page 35a).

Ohio Courts have held that if a contempt charge be filed the petitioner receives a presumption of innocence requiring the Respondent to establish the contempt guilt beyond a reasonable doubt. **McAllister**

Dairy Farms, Inc., -vs- Amalgamated Meat Cutters and B. W. U., 81 O L Abs.534, 162 N. E. 2nd 881; **State -vs- Treon,** 188 N. E. 2nd 308. The procedural safeguards required by **Freedman -vs- Maryland,** 380 U. S. 51 are thus more than adequately protected by Ohio statute and case law.

Thus, we find no conflict between the decision of the Ohio Courts in the instant case and decisions of the United States Supreme Court. The Federal Courts in **Soverign News Co. -vs- Corrigan,** 610 FED R 2d 428 clearly recognized the same Ohio statute, to wit; **Ohio Revised Code 2907.32** to be a correct, proper and constitutional law as interpreted by the Ohio Supreme Court in **State -vs- Burgun,** 56 O S 2d 354, 359 N. E. 2d 1018.

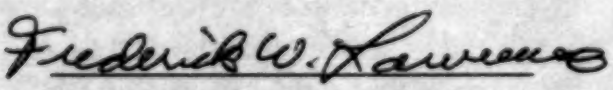
The granting of the injunction in this action is an attempt to prevent sale of obscene material only if it is adjudged to be so under the criminal requirements of Ohio Revised Code, Section 2907.32. This injunction in conformity with State law is the only effective remedy than can be used to control such material. The enforcement of the criminal law sections of the Ohio Code against individuals only punishes that person who is so engaged. To fail to uphold the action of the Ohio Courts would result in continual criminal actions which act only as a deterrent but do not result in the elimination of such harmful material.

CONCLUSION

The Petitioner makes a feeble attempt to convince this Court that there exists grounds to permit a review of the Ohio Courts decision in this matter. There is no constitutional violation of law existing; there is clearly no conflict between the Ohio Appellate order now in effect and the decision of this Court. The specific Ohio statute such Court recites in its order establishing the guidelines upon which obscenity is determined has been ruled constitutional on many occasions by the Federal Court system. This has been pointed out in this brief and as previously indicated has even been upheld by many Federal Courts in the criminal conviction of the manager of defendant's business. There can be no more clearly defined guidelines on the subject than that established by the Ohio Appellate Court. There certainly can be no more restrictive contempt proof required than what will be required of Respondent in the instant case.

Thus, Petitioner's request for a Writ of Certiorari should be denied.

Respectfully Submitted,



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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

No. 81-2313

AVENUE BOOK STORE,

Petitioner

-vs-

CITY OF TALLMADGE, OHIO,

Respondent

ENTRY OF APPEARANCE

The Clerk will enter my appearance as Counsel for the City of Tallmadge, Ohio, Respondent.

Frederick W. Lawrence

FREDERICK W. LAWRENCE
Municipal Building
46 North Avenue
Tallmadge, Ohio

CERTIFICATE OF SERVICE

I, Frederick W. Lawrence, attorney for the City of Tallmadge, Ohio, Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 24th day of August, 1982, I served by certified mail a copy of the foregoing Brief on George W. Palda of Berkman, Gordon, Murray and Palda, Attorney of record for the Petitioner, being the only party required to be served,at his office located at 2121 Illuminating Building, 55 Public Square, Cleveland, Ohio, 44113.

Frederick W. Lawrence

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APPENDIX

THE SUPREME COURT OF OHIO

THE STATE OF OHIO, **1982 TERM**

City of Columbus **To wit: February 23, 1982**

No. 81-1946

City of Tallmadge, **MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS**

Appellee

vs.

Avenue Book Store,

Appellant. **for Summit County**

TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Bernard A. Berkman

_____

_____

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

RECEIVED *Witness my hand and the seal of the court*

FEB 25 1982 *this_____day of_____19_____*

LAW DIRECTOR'S OFFICE _____*Clerk*

_____*Deputy*

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,	1982 TERM
City of Columbus.	To wit: February 24, 1982
City of Tallmadge,	No. 81-1946
Appellee	**APPEAL FROM THE COURT OF APPEALS**
vs.	
Avenue Book Store,	for Summit County
Appellant.	

This cause, here on appeal as of right from the Court of Appeals for Summit County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

FOR YOUR
INFORMATION
ONLY
NOT FOR FILING

It is further ordered that a copy of this entry be certified to the Clerk of of the Court of Appeals for Summit County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court

RECEIVED this____day of_____19_____

FEB. 25 1982
LAW
DIRECTOR'S
OFFICE

_____Clerk

_____Deputy

STATE OF OHIO		IN THE
	ss:	COURT OF APPEALS
COUNTY OF SUMMIT		NINTH JUDICIAL DISTRICT

THE CITY OF TALLMADGE — C. A. NO. 10038

Plaintiff-Appellee

v. — APPEAL FROM JUDGMENT ENTERED IN THE COMMON PLEAS COURT

AVENUE BOOK STORE — COUNTY OF SUMMIT, OHIO CASE NO. CV 79 4 0999

Defendant-Appellant

Received Oct. 28, 1981 Law Director's Office

DECISION AND JOURNAL ENTRY

Dated: October 28, 1981

This cause was heard June 9, 1981, upon the record in the trial court, including the transcript of proceedings, and the briefs. It was argued by counsel for the parties and submitted to the court. We have reviewed each assignment of error and make the following disposition:

PER CURIAM

Appellant, Avenue Book Store (the bookstore), appeals from a finding that 197 books, magazines, films and sexual devices or aids sold by the bookstore were

obscene and that the bookstore was, therefore, a common law public nuisance. The trial court permanently enjoined the sale, display or exhibition of the 197 items found to be obscene and, in abatement of the nuisance ordered the rear portion of the store closed and barred the defendant from using it for any similar purpose. We reverse in part and affirm in part as modified by this opinion.

FACTS

Avenue Book Store is a retail establishment operating in Tallmadge, Ohio. The store is divided into two sections. The front section operates as a regular newstand selling current newspapers and magazines. A partition separates the front portion of the store from the rear, which one enters through a swinging door. The rear portion of the store displayed for sale sexually oriented films, books, magazines and Doc Johnson's "love products," which include dildoes, inflatable dolls, and vibrators in various shapes. Some of the films were shown through coin-operated machines. Entrance into this area is limited to persons 21 years of age or older.

A short time prior to the filing of this case on April 18, 1979, the law director and assistant law director of Tallmadge and a police officer entered the bookstore. They compiled a list of magazines and book titles and the names of sexual devices, which list was attached to a subpoena duces tecum served on appellant. The subpoena also required the appellant to produce all films sold in the rear portion of the store. The appellant timely filed a motion to quash the subpoena, which the trial court denied. Appellee produced 197 items as exhibits and all were admitted by the court.

The 197 exhibits included 25 magazines, 51 books, 18 sexual devices and 103 films, including those

shown in the coin-operated machines. After a trial to the court, the trial judge found all 197 exhibits to be obscene. Counsel for the parties stipulated that the court's examination of the exhibits involved viewing 12 of the 103 films, 4 magazines in whole or part, all the devices and a few pages of 5 books and the covers of the other 46. On the basis of the finding that the bookstore was selling obscene materials the trial court concluded that its operation constituted a common law public nuisance as "a danger to the public morals and to the community welfare." As a result of these findings and in accordance with appellee's requests, the court made the following order:

"Accordingly, this Court ORDERS, ADJUDGES AND DECREES THAT:

"* * * *"

"(a) The materials and products sold, displayed, and exhibited by defendant, as evidenced in the record and reviewed by this Court, are obscene and shall be permanently enjoined;

"(b) In abatement of the nuisance itself, the rear portion of defendant's store (that portion devoted to a sexual orientation and setting) as presently constituted and being the situs of the nuisance, is ordered closed forthwith and defendant is not permitted to use it for any similar purpose."

"* * * *"

ASSIGNMENT OF ERROR I

"The trial court erred in finding certain materials, introduced as exhibits, to be obscene and in permanently enjoining the display and sale of those materials in the absence of a thorough review and examination by the trial court of each of the materials to be enjoined, in violation of the First and Fourteenth Amendments to the United States Constitution."

Appellant bookstore contends that the trial court could not enjoin as obscene those materials of which it made a cursory review and examination. We agree and, therefore, modify part (a) of the judgment entry set out above.

In Miller v. California (1973), 413 U. S. 15, 24, the Supreme Court established the current test for determining the obscenity of any given work or expression.

"****"

> "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest,***; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.
> ***." (Citations omitted).

We note, as did the court in Bantam Books, Inc. v. Sullivan (1963), 372 U. S. 58, 66, that there is no definitive division between protected and unprotected expression. Because of this fine line and the strong First Amendment presumption for protecting speech the courts must use "sensitive tools" when judging just what expression is obscene. Speiser v. Randall (1958), 357 U. S. 513, 525.

In light of these principles we find that the trial court could not constitutionally enjoin the sale of materials as obscene which it did not properly review under the Miller standard. The Miller test explicitly states that the work should be judged as a whole. Therefore, a determination of obscenity and a subsequent injunction against future sales of named items is proper only as against those specific books, magazines and films

actually examined and considered as a whole. Hollington v. Ricco (1973), 40 Ohio App. 2d 57, 69; New Rivieria Arts Theatre v. State, ex rel. Davis (1967), 219 Tenn. 652, 412 S. W. 2d 890, 894; State, ex rel. Field v. Hess (Okla. (1975), 540 P. 2d 1165, 1170.

Therefore, part (a) of the lower court's judgment must be modified. In accordance with the parties' stipulation the following exhibits are obscene under proper court review and their further sale may be permanently enjoined: twelve films, exhibit nos. 83, 88, 89, 103, 110, 112, 114, 127, 134, 136, 152, and 153; four magazines, exhibit nos. 12, 13, 15, and 29. The remaining films and magazines were not properly examined under Miller. Moreover, none of the paperback books were properly reviewed. The injunction against the sexual devices will be dealt with under assignment of error six. As modified part (a) of the judgment entry of January 9, 1981, is affirmed.

ASSIGNMENT OF ERROR III

> "The trial court erred in entering a finding of obscenity concerning the materials offered as exhibits, in violation of the First and Fourteenth Amendments, where there was no evidence of community standards."

Appellant bookstore claims that appellee failed to prove the necessary community standards applicable to a finding of obscenity. Since the city has the burden of proof on all elements of obscenity under Miller, supra, the appellant argues that a failure of proof on the element of community standards negates the trial court's finding of obscenity. Appellant asserts that Hamling v. United States (1974), 418 U. S. 87, 104-105, would require application of the standards of the vicinage, i. e. County of Summit. The contention is that a County of Summit judge would be able to apply such a standard, but since the trial judge was from Lake

County independent proof of the community standards of Tallmadge and County of Summit was necessary. This argument is tenuous and we reject it.

In Hamling, supra at 105, the court stated: "***.

> "The result of the Miller cases, therefore, as a matter of constitutional law and federal statutory construction, is to permit a juror sitting in obscenity cases to draw on knowledge of the community or vicinage from which he comes in deciding what conclusion 'the average person, applying contemporary community standards' would reach in a given case.***."

Although Hamling spoke to the standard to be applied by a jury in an obscenity case, we believe that the same principle applies to a case tried to the court. Appellant has admitted that a County of Summit judge could properly apply the community standard test. A judge sitting by assignment in County of Summit is committed to performing the same duties and exercising the authority of a judge of this country, including applying contemporary community standards. Although Mrs. Litner's testimony is indicative of a community standard, the lack of expert evidence of a local community standard does not affect the finding of obscenity for those materials properly reviewed and examined by the court.

ASSIGNMENT OF ERROR IV

> "The trial court erred in failing to suppress exhibits offered into evidence which had been produced pursuant to a subpoena that was a product of a search in violation of the Fourth and Fourteenth Amendments."

Appellant suggests that the compilation of a list of

materials contained in the rear portion of the bookstore, which list was attached to a subpoena duces tecum served on appellant, amounted to an unreasonable, warrantless search and seizure. We cannot agree.

The suggestion that the perusal of the rear portion of the bookstore by the Tallmadge Law Director and assistants and the attendant list-making necessitated a warrant is attenuated. Unlike United States v. Gray (C. A. 6, 1973), 484 F. 2d 352, this case involves a business open to the public, not the closet of a private dwelling. As business invitees the law director and his assistants acted in a manner consistent with being customers. The fact that they spent several hours perusing the stock of the bookstore does not change their conduct into a search.

We are not dealing with a situation similar to that in Lo-Ji Sales, Inc. v. New York (1979), 442 U. S. 319. In that case a judge and police officers examined books, films and magazines in a store with the intent of seizing, under an open-ended warrant, any materials the judge determined to be obscene. The searchers viewed films without paying for them, took books without paying for them, and opened magazines wrapped in cellophane. The searchers were not viewing the material as a customer would ordinarily see them.

In the case before us there was no evidence of procuring materials without paying for them or of opening items an ordinary customer could not open. In fact the evidence in the case indicates that appellee's agents only perused the rear portion of the bookstore as would any customer, leafing through items in full view and on display.

We find that compiling a list of titles of items sold by appellant while viewing the material does not rise to the level of a search contemplated by the Fourth

Amendment. Consequently, because the list was properly obtained the subpoena to which it was attached was constitutional.

ASSIGNMENT OF ERROR V

> "The trial court erred in failing to dismiss the suit because the lawsuit was initiated pursuant to Tallmadge Ordinance 34 - 1979 which is an unconstitutional bill of attainder and violates appellant's rights to due process and equal protection under the United States Consitution."

A bill of attainder is a legislative act which applies to named individuals or an ascertainable group "'***in such a way as to inflict punishment on them without a judicial trial ***.'" United States v. Brown (1965), 381 U. S. 437, 448-49, citing United States v. Lovett (1946), 328 U. S. 303, 315-16. Although Tallmadge Ordinance 34-1979 specifically names the Avenue Book Store, the thrust of the ordinance is to recommend to the city's law director that he initiate legal proceedings against appellant. As constituted the ordinance imposes no penalty or punishment on the bookstore without a judicial trial. Any sanctions which flow from the action of Tallmadge City Council against appellant will be imposed only as a result of the trial had in this case and not as a result of Tallmadge Ordinance 34-1979. Therefore, the challenged ordinance is not a bill of attainder.

ASSIGNMENT OF ERROR VII

> "The trial court erred in issuing injunctive relief based upon a finding of obscenity because R. C. %2907.01 and Tallmadge Ordinance 76.1 violate the First and Fourteenth Amendments."

Appellant has challenged the constitutionality of R. C. 2907.01 and Tallmadge Ordinance 76.1, which

define obscenity. Although Section 76.1 was not the basis for the present action, we note that Chapter 76, and Section 76.1 in particular were found to be constitutional by this court in City of Tallmadge v. Chapman (Summit Co. Ct. App. No. 9140, Decided July 18, 1979), unreported in which case this defendant's store manager was convicted of pandering obscenity in the same store. Furthermore, the Ohio Supreme Court has conclusively determined that R. C. 2907.01 is constitutional in State v. Burgun (1978), 56 Ohio St. 2d 354 and State v. Thomas (1979), 57 Ohio St. 2d 71.

ASSIGNMENT OF ERROR II

> "The trial court erred by issuing an abatement order closing the rear portion of appellant's bookstore which contained sexually oriented materials and enjoining appellant from using the rear portion of the bookstore for any purpose similar to the display and sale of sexually oriented materials, in violation of the First and Fourteenth Amendments to the United States Consitution."

This assignment of error presents the question of whether the injunction granted in this case was an unreasonable prior restraint in violation of the First and Fourteenth Amendments. On the basis of the trial court's finding that the bookstore displayed, exhibited and sold obscene materials the court concluded that the bookstore constituted a common law public nuisance. The court then entered part (b) of its order as set out above.

The controversy in this case arises not from the order enjoining any future exhibition or sale of those specific materials actually found to be obscene, but rather from the abatement provision which attempts to enjoin all future sales of obscene material. It is clear that obscene material is unprotected by the First

Amendment. Miller v. California, supra at 23: Roth v. United States (1957), 354 U. S. 476, 485. Since obscene material is not constitutionally protected the states can regulate material judicially determined to be obscene through criminal sanctions or by injunctions. See Kingsley Books, Inc. v. Brown (1957), 354, U. S. 436, 441. However, since there are inherent constitutional dangers in attempting to regulate any form of expression, state efforts to regulate obscene material must be limited. Miller, supra at 23-24.

Appellant asserts that the injunction entered in part (b) of the trial court's judgment is an unconstitutional prior restraint of unnamed and unreviewed materials. We must first determine whether, pas presently constituted, the injunction entered in abatement of the nuisance can be sustained. As drawn by the trial court the import of the judgment order is that the bookstore is to be closed as a public nuisance for the past sales of obscene material. Any complete closing of a business for past sales of obscene material constitutes an illegal prior restraint. State, ex rel. Andrews v. Chateau X, Inc. (1979), 296 N. C. 251, 250 S. E. 2d 603 (Chateau X(I), vacated and remanded (1980), 445 U. S. 947, reaffirmed (1981), 275 S. E. 2d 443 (Chateau X (II)); People ex rel. Busch v. Projection Room Theater (1976), 17 Cal. 3d 42, 550 P. 2d 600; State v. A Motion Picture Entitled "The Bet" (1976), 219 Kan. 64, 547 P. 2d 760; Spokane Arcades, Inc. v. Brockett (C. A. 9, 1980), 631 F. 2d 135. See also Organization for a Better Austin v. Keefe (1971), 402 U. S. 415. This principle should apply equally to any distinct portion of a business. Therefore, any language which purports to close the rear portion of appellant's store must be deleted from the injunctive order entered below.

Although the abatement order cannot contemplate the closure of the entire rear portion of appellant's store, it can limit appellant's future exhibition, display

or sale of obscene material, if the prohibited conduct is explicitly defined. See Chateau X (I), supra, and Chateau X (II), supra. Therefore, we hereby modify part (b) of the trial court's judgment order as follows:

> "(b) In abatement of the nuisance, defendant is enjoined from utilizing the rear section of the store for the exhibition, display or sale of materials which display or depict sexual conduct (activity) that is obscene as defined by R. C. 2907.01 and interpreted by the Ohio Supreme Court in State v. Burgun (1978), 56 Ohio St. 2d 354."

We find this modification to be constitutional for several reasons. Initially, we stress that although the injunction looks to future conduct, in practical terms the injunctive process will be invoked and contempt proceedings brought only after the appellant seeks to exhibit, display or sell obscene material. Furthermore, no punishment will be imposed until it is proven that obscene material was indeed involved. Consequently, the modified injunction does not, in the true sense of the words, constitute a "prior restraint." Vance v. Universal Amusement Co. (1980), 445 U. S. 308, 324 (White, J. dissenting); Chateau X(I), supra at 610.

Assuming arguendo, that the injunction, as modified here, is a "prior restraint," it is not an unconstitutional one. Although there is a heavy presumption against the validity of prior restraints, prior restraints are not unconstitutional per se. Southeastern Promotions, Ltd. v. Conrad (1975), 420 U. S. 546, 558.

"* * * *".

> "The settled rule is that a system of prior restraint 'avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censor-

> ship system.' Freedman v. Maryland, (1965), 380 U. S. 51, 58. ***." Id. at 559.

If there is a prior restraint in the form of this injunction, it does not carry with it any of the dangers of a censorship system. As discussed above appellant will not be barred from nor punished for selling any protected material. Furthermore, before any material is subject to final restraint or appellant is punished, a contempt charge must be filed and the material must be found to be obscene after a trial to the court. See R. C. 2705.02 et seq. Therefore, appellant may continue to operate and sell at his peril, any item until it us judicially determined to be obscene.

We are persuaded in our decision by the fact that the operative effect of the injunction, at issue here, is no different from the operation of the Ohio criminal statutes on obscenity, in particular R. C. 2907.32. The criminal statutes already prohibit appellant from selling obscene materials. Therefore, the injunction sanctioned by this opinion places no greater burden on appellant or his First Amendment rights than does the existing criminal law which imposes punishment only after a violation and proof of obscenity. An almost identical statutorily imposed injunction was upheld as constitutional in Chateau X(II), supra. The fact that the injunction in the present case was predicated on common law principles does not distinguish this case from Chateau. Since the Ohio obscenity statute has been held to be constitutional in State v. Burgun, supra, the injunction, which subjects appellant to no greater restraints, is also constitutional. Vance v. Universal Amusement Co., Inc., supra at 324-325 (White, J., dissenting).

We do not believe that our decision conflicts with the court's opinion in Vance. At the crux of that decision was the concern for the lack of procedures in the

Texas statutes for making a final determination of obscenity after issuance of a temporary injunction against a film exhibition. Without such procedures the temporary injunction became an indefinite prior restraint that was "more onerous than is permissible under Freedman v. Maryland [(1985), 380 U. S. 51] and Southeastern Promotions, Ltd. v. Conrad, 420 U. S. 546.***." Vance v. Universal Amusement Co., supra at 317. Moreover, the Supreme Court majority argued that the injunction in Vance required the film exhibitor to obey the order prior to any review of the merits of a film and presumably would subject the exhibitor to contempt proceedings even if the film was determined not to be obscene. Vance, supra at 316. However, in affirming the court of appeals judgment in Vance, the court noted that the court of appeals did not hold there could never be a valid prior restraint on expression.

Unlike the circumstances present in Vance, the present injunction, as modified by this opinion, would provide adequate procedural safeguards against impermissible prior restraints. Our case does not involve a temporary injunction entered before a final determination of the obscenity issue. Furthermore, the injunction would not subject appellant to a contempt finding if the material at issue was found to be nonobscene. If the injunction at issue here was a prior restraint at all, it was a valid one no more onerous nor objectionable than the threat of criminal sanctions. See Vance, supra at 316. Therefore, the injunction against the appellant's future display, exhibition or sale of obscene materials, as modified by this opinion, is a proper constitutional restraint in abatement of the public nuisance finding by the trial court

ASSIGNMENT OF ERROR VI

"An injunction against the sale of sexual aids violates the due process clause of the Fourteenth Amendment.".

This assignment of error is limited to a review of the 18 sexual aids and devices entered as exhibits, nos. 186-203. The arguments made above in regard to the books, magazines and films are riveted on the principle that freedom of expression is protected by the First Amendment. We cannot find, under any interpretation, that the 18 sexual aids or devices involved in this case are a form of expression as that word has been interpreted by the United States Supreme Court. This conclusion is not affected by the presence of printed matter on the package with which these items were sold. The 18 items enumerated above are nothing more than inanimate objects to be used in various ways but lacking any inherent expressive quality. Therefore, the sexual aids and devices exhibited in this case are not protected under the First Amendment.

We also reject appellant's claim that the sexual aids are protected under the principles enunciated in Griswold v. Connecticut (1965), 381 U. S. 479 and its progeny, which interpreted the due process clause of the Fourteenth Amendment as including a right to privacy in certain circumstances. Due process principles, as interpreted by Griswold, are not implicated here since this case does not concern itself with the private use of sexual aids but their dissemination commercially to the general public. Thus, the sexual aids and devices displayed and sold by appellant and exhibited in this case are properly the subject of regulation of "material" as defined in R. C. 2907.01(J):

> "'Material' means any book, magazine, newspaper, pamphlet, poster, print, picture, figure, image, description, motion picture film, phonographic record, or tape, or other tangible thing capable of arousing interest through sight, sound, or touch."

We find the items at issue here can be categorized

as figures or other tangible things capable of arousing interest through sight, sound, or touch. However, we hold that it would be improper to enjoin the sale or display of any "materials" which are not obscene as defined by R. C. 2907.01(F). After reviewing the sexual aids introduced into evidence in this case, we affirm the trial court's finding of obscenity as to exhibit nos. 189, 193, 194, 197 and 201. We further hold that as a matter of law exhibit nos. 186, 187, 188, 190, 191, 192, 195, 196, 198, 199, 200, 202, and 203 are not obscene as defined by R. C. 2907.01. Therefore, the future sale of those exhibits properly found obscene can be enjoined by part (a) of the court's judgment entry. Furthermore, the future exhibition, display or sale of unnamed sexual aids and devices which are obscene under R. C. 2907.01 may also be enjoined.

—

The court finds that there were reasonable grounds for this appeal.

We order that a special mandate, directing the County of Summit Common Pleas Court to carry this judgment into execution, shall issue out of this court. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22 (E).

Costs taxed to appellant.

Exceptions.

Presiding Judge
-for the Court-

VICTOR, P. J.
QUILLIN, J.
CONCUR

MAHONEY, J. CONCURS IN PART AND DISSENTS IN PART SAYING:

I concur in the majority's resolution of assignments of error I, III, IV, V, VI and VII. However, I must dissent from the majority's disposition of assignment of error II.

The majority's argument is twofold. First, they argue that, although the injunction declares a general ban on the future exhibition or sale of unnamed and allegedly obscene materials, appellant will be permitted to sell any item, without the possibility of punishment, until after a final judicial determination that the item is obscene. Consequently, the majority asserts that the injunction does not, in the true sense of those words, constitute a "prior restraint." Second, they argue that even if this injunction is characterized as a prior restraint, it is a permissible one because its affect on appellant is no more onerous than applicable criminal sanctions under Ohio's obscenity statutes. These arguments are unpersuasive and this interpretation, in my judgment, renders part (b) of the injunction an unconstitutional prior restraint on future expression.

Admittedly, all prior restraints are not per se unconstitutional Bantam Books, Inc. v. Sullivan (1963), 372 U. S. 58, 70; Southeastern Promotions, Ltd. v. Conrad (1975), 420 U. S. 546, 558.

> "* * * .
>
> "Any system of prior restraint, however, 'comes to this Court bearing a heavy presumption against its constitutional validity.' * * * The presumption against prior restraints is heavier--and the degree of protection broader--than that against limits on expression impos-

> ed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.***." (Citations omitted).
>
> Southeastern Promotions, Ltd. v. Conrad, supra, at 558-559.

The Supreme Court recently reaffirmed this presumption against prior restraints in Vance v. Universal Amusement Co., Inc. (1980), 445 U. S. 308, 315-316, n. 13, specifically in the context of an injunction against future film exhibitions. I cannot agree that the injunction at issue here overcomes any such presumption or provides adequate protection to freedom of expression.

The injunction as rewritten by the majority constitutes a blanket injunction against the future exhibition, display or sale of obscene materials and purports to define what material is prohibited by reference to the Ohio statute and applicable case law. I believe this is the very type of restraint on future expression the Supreme Court has continually rejected from Near v. Minnesota (1931), 283 U. S. 697 to Vance v. Universal Amusement Co., Inc., supra. In essence, the injunction restrains future sales of material not yet adjudicated to be obscene on the basis of appellant's past conduct. As Justice Exum aptly stated in his dissent in Chateau X, Inc. v. State, ex rel. Andrews (N.C., 1981), 275 S. E. 2d 443, 449:

"****

> "Vance says that injunctions against future expressions are intrinsically different from criminal sanctions against past expressions.***."

Therefore, it is inappropriate for the majority to compare the relative effects, on appellant's First Amendment rights, of an injunction and a criminal statute which regulate obscenity.

The injunction is a present prohibition against sales or displays of certain types of materials before any consideration of their content. The criminal statutes on obscenity are only invoked in the future after a violation and a final determination of obscenity. I cannot accept the majority's argument that the injunction constitutes no prior restraint because a contempt citation will not issue until the material alleged to violate the injunction is determined to be obscene. Neither is the prior restraint inherent in this injunction, a reasonable one under current case law.

The injunction leaves appellant to engage in self-censorship of unreviewed materials in order to avoid contempt proceedings. Limiting the injunction to the same language incorporated in Ohio's criminal obscenity law does not save the injunction.

> "***Incorporation of the statutory definition of obscenity--usually a listing of forbidden sexual acts of acrobatics--merely begs the question, for few of us have the omniscience to determine, in advance of a final judicial ruling, whether a film is legally obscene.***An injunction that forbids the showing of any film portraying the particular acts enumerated in the obscenity statute suppresses future films because past films have been deemed offensive. As Chief Justice Hughes wrote in Near v. Minnesota, supra 283 U. S. at 713,***'[t]his is

of the essence of censorship.'"

"* * *." Universal Amusement Co., Inc. v. Vance (C.A. 5, 1978), 587 F. 2d 159, 169.

Several state supreme courts have reached a similar conclusion regarding injunctions that attempted to restrain future sales or exhibitions of obscene materials defined in the given injunction. News Mart, Inc. v. State, ex rel. Webster (Tenn. 1978), 561 S. W. 2d 752; Parish of Jefferson v. Bayou Landing Limited, Inc. (La., 1977), 350 So. 2d 158; Mitchem v. State, ex rel. Schaub (Fla., 1971), 250 So. 2d 883; New Riviera Arts Theater v. State, ex rel. Davis (1967), 219 Tenn. 652, 412 S. W. 2d 890. See also Fehlhaber v. North Carolina (E. D. N. C., 1978), 445 F. Supp. 130, which found unconstitutional an injunction predicated on the same statutory scheme found constitutional by the North Carolina Supreme Court in State, ex rel. Andrews v. Chateau X, Inc. (1979), 292 N. C. 251, 250 S. E. 2d 603, vacated and remanded (1980), 445 U. S. 947, reaffirmed (1981), 275 S. E. 2d 443.

The most glaring difference between the effect of the criminal statutes and an injunction is the lack of procedural safeguards; most notably the right to a jury trial. State v. Weiner (1974), 37 Ohio St. 2d 11; 17 Ohio Jurisprudence 3d 392, Contempt, Section 64. If appellant were subject only to criminal sanctions, subsequent violations of R. C. 2907.32 would constitute a felony and thus, entitle appellant to a trial by jury. Under the injunction appellant would be subject to prosecution under R. C. 2705.02 et seq. and R. C. 2727.11 and R. C. 2727.12. It is also left to the court to determine whether a violation of the injunction constitutes criminal or civil contempt. If civil contempt is involved, only clear and convincing evidence must be shown whereas a criminal contempt charge requires proof beyond a reasonable doubt. Brown v. Executive 200, Inc. (1980), 64 Ohio St. 2d 250.

The shortcomings inherent in contempt proceedings relative to criminal proceedings cannot but have a chilling effect on presumptively protected expression. Because we are dealing with expression, our attempts at regulation should be more refined and sensitive to the constitutional elements of that expression. Speiser v. Randall (1958), 357 U. S. 513, 525. Limitations of expression are categorically different from attempts to regulate as a nuisance such things as noise or air pollution. Therefore, I can reach no other conclusion but that the injunction imposed here is more onerous, in light of the First Amendment, than criminal sanctions imposed after a violation has occurred. See Chateau X, Inc. v. State, ex rel. Andrews (1981), 275 S. E. 2d 443, 449, (Exum, J. dissenting).

I must also disagree with the majority in their interpretation of Vance. They argue, in support of the present injunction, that Vance stated that all prior restraints are not unconstitutional per se. Vance, supra at 317. However, the prior restraints, which the Vance court states are sanctioned in Freedman v. Maryland (1965), 380 U. S. 51 and Southeastern Promotions, Ltd. v. Conrad, supra, are not analogous to those imposed here. In all the cases cited in Southeastern Promotions and Freedman the court approved brief prior restraints imposed for the purpose of preserving the status quo where there was a provision for a prompt final determination of the obscenity issue. See Kingsley Books, Inc. v. Brown (1957), 354 U. S. 436; Heller v. New York (1973), 413 U. S. 483. The injunction at issue here is an attempt to permanently and indefinitely restrain unnamed materials prior to a final adjudication of the obscenity issue and, therefore, is an unconstitutional prior restraint. Moreover, no special safeguards or expedited procedures are provided for in the injunction as constituted.

Finally, I reject the majority's attempt to limit the

Supreme Court's holding in Vance to a review of the temporary injunction procedures of the Texas statute. The majority opinion in Vance affirmed the en banc decision of the Fifth Circuit in 587 F. 2d 159. Not only did that decision find the Texas statute lacking regarding the temporary injunction provisions but it specifically found:

> "***An injunction that forbids the showing of any film portraying the particular acts enumerated in the obscenity statute suppresses future films because past films have been deemed offensive.***'[t]his is of the essence of censorship.'
>
> "We therefore hold that Article 4667(a)(3) is unconstitutional insofar as it authorizes injunctions against the future exhibition of unnamed films.***."

Universal Amusement Co. Inc. v. Vance (C.A. 5, 1978), 587 F. 2d 159, 169. Tex. Rev. Civ. Stat. Ann., Article 4667(a)(3) is the very section which the Supreme Court opinion reviewed. The fact that the opinion, as an example, referred to the provisions regarding temporary injunctions does not thereby overrule the Court of Appeals holding on the other deficiencies in Article 4667(a)(3). Consequently, I believe that the affirmance of the en banc decision of the Fifth Circuit in Vance included an affirmance of the language quoted above. Therefore, I assert that Vance supports a finding that the injunction at issue here is an unconstitutional prior restraint.

restraint.

I would, therefore, reverse part (b) of the judgment in all respects. The laudable demands of society to suppress obscenity can be achieved through repeated criminal prosecutions even though Vance, supra renders the nuisance injunction virtually useless.

APPEARANCES:

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IN THE COURT OF COMMON PLEAS

SUMMIT COUNTY, OHIO

Case No. CV 794-0999

The City of Tallmadge,Ohio
Plaintiff

-vs-

JUDGMENT ENTRY

Avenue Book Store
Defendant

Received January 9, 1981 Law Director's Office

The case at bar involves a continuing dispute between the municipality of Tallmadge, Ohio, and the Avenue Book Store, 298 West Avenue in Tallmadge.

The City of Tallmadge is seeking injunctive relief against defendant Avenue Book Store.

The municipality of Tallmadge, Ohio, is a city of some 18,000 people, about 20 minutes northeast of Akron, Ohio, by expressway, in Summit County. It is a city of many churches (at least 14) and no slums or saloons (according to the Tallmadge Chamber of Commerce). Ordinance 15-1936 enacted March 16, 1937 bans the sale of all liquor and intoxicating beverages. To this date, despite local option privileges provided by Ohio law, the entire city remains dry. No state liquor store exists within the municipal corporation nor is it possible to legally purchase carry-out beer or wine within the city limits.

Into this relatively puritan community on or about June 15, 1978, a retail business known as the Avenue Book Store was established. Judge Hunsicker, in **Tallmadge v. Chapman,** Ninth District Court of Ap-

peals, Case No. 9140, decided July 18, 1979, describes the physical appearance of this retail establishment succinctly and in a manner consistent with the evidence in the instant case.

> "The news store (Avenue Book Store) has two sections, one in which current newspapers and magazines are sold and the other in which Doc Johnson's 'love products', dildoes, vibrators, soap in the shape of vaginas and penises and sexually oriented magazines are sold. The section where the 'love products' and sexually oriented magazines were sold was limited to those over 21 years of age."

The Court of Appeals decision which contained Judge Hunsicker's opinion was sustained by the Ohio Supreme Court. **Tallmadge v. Chapman,** appeal dismissed, No. 79-1260, Ohio Supreme Court, (1979). It affirmed the conviction of Lois Chapman, manager of this same Avenue Book Store, on three counts of pandering obscenity, violations of the Tallmadge City Ordinance.

In the instant matter, 203 exhibits were admitted into evidence, consisting of films, paperback books, magazines and various sexual toys.

The exhibits speak for themselves and the Court herein declares them to be obscene and finds that the Avenue Book Store is selling, displaying and exhibiting obscene material. Revised Code Section 2907.01 (F). This Court further declares that these actions have occurred in the rear section of the Avenue Book Store–that section which is sexually oriented and separated by a partial physical barrier from the front section which sells legitimate newspapers and magazines, i. e., those which are not obscene. The materials sold, displayed and exhibited are all of a hard-core pornographic nature.

Much has been written about the law and pornography. Case books and law journals overflow with lengthy opinions. Judges seem eager to publish their views.

This Court, however, is unable to find any case law, a statute, or any rational line of legal argument which would force a community of a character similar to Tallmadge, Ohio, to submissively yield itself into service as a kind of barnyard dung-heap in behalf of a hard-core pornographic book store.

Accordingly, this Court ORDERS, ADJUDGES AND DECREES that:

(a) The materials and products sold, displayed, and exhibited by defendant, as evidenced in the record and reviewed by this Court, are obscene and shall be permanently enjoined;

(b) In abatement of the nuisance itself, the rear portion of defendant's store (that portion devoted to a sexual orientation and setting) as presently constituted and being the situs of the nuisance, is ordered closed forthwith and defendant is not permitted to use it for any similar purpose.

Exceptions to the parties.

FRED V. SKOK, Judge
(Sitting by assignment)

cc:
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IN THE COURT OF COMMON PLEAS

SUMMIT COUNTY, OHIO

The City of Tallmadge,Ohio

Case No. CV 79-4-0999

Plaintiff

-vs-

Findings of Fact And Conclusions of Law

Avenue Book Store

Defendant

Received February 19, 1981 Law Director's Office

This cause came on for trial on the nineteenth day of August, 1980. The Court having heard the evidence and considered the arguments of the parties, and the defendant having filed a request for separate findings and conclusions on the general findings theretofore made, therefore finds the facts and states the conclusions of law as follows:

FINDINGS OF FACT

1. That the defendant Avenue book Store is located and doing business in the City of Tallmadge, Summit County, Ohio.

2. That the City of Tallmadge is a relatively puritan community of approximately 18,000 people containing at least fourteen churches and no slums, saloons, carry-out beer and wine stores or state liquor stores.

3. That said Book Store is divided into front and back rooms; the rooms being separated by a wall with swinging doors to the back room; but that a portion of the articles displayed in the back room can be observed from the front portion of the store.

4. That there is a sign on the doors to the back room which states that one must be over twenty-one years of age to enter.

5. That the front portion of the store is devoted to the regular newsstand type of business.

6. That the back room of the store is devoted to the sale of Doc Johnson's "love products", dildoes, and vibrators, magazines, books and movies directed toward bondage, homosexual activity, lesbian activity and other types of sexual activity; and these items are all openly displayed on the walls and in racks in the back room; and that such type of display has been continuous since June 15, 1978.

7. That the officials of the City had received numerous complaints about the items being sold in the back room of the store.

8. That the plaintiff subpoenaed many of the movies, books, magazines and devices on display in the back room and the defendant has produced 46 paperback books, 25 magazines, 103 movies, and eighteen sexual devices or objects; each book, magazine, movie and sexual device being different.

9. That on or about November 30, 1978, Lois Chapman, as manager of the Defendant Book Store was found guilty by a jury in the Cuyahoga Falls Municipal Court in Cases Numbers 78 CRB 1144 and 78 CRB 1145 of violating Section 76.11 (captioned "Pandering Obscenity") of the Tallmadge Code. That such convictions were for two occasions, to wit: June 15, 1978 and July 1, 1978.

10. That this Court actually observed twelve film exhibitions; that a cursory examination was made by the Court of the remaining exhibits.

11. That the materials and products sold, displayed and exhibited in the rear portion of the store by defen-

dant as evidenced in the record and reviewed by the Court in the instant case are obscene.

CONCLUSIONS OF LAW

1. The exhibits entered in this action–books, films, magazines and products sold by defendant–are found to be obscene by law. Revised Code §2907.01(F), which defines "obscenity," is Constitutional, being neither overbroad nor void for vagueness when authoritatively construed under the guidelines established by the United States Supreme Court in **Miller v. California,** 413 U. S. 15 (1973). **State v. Burgun,** 56 Ohio St. 2d 354, 384 N. E. 2d 255 (1978); **State v. Thomas,** 57 Ohio St. 2d 71, 387 N. E. 2d 299 (1979). The reviewed materials, taken as a whole, appeal to prurient interests in sex through the portrayal of hardcore sexual conduct in a patently offensive way. These materials, individually and as a whole, lack serious literary, artistic, political or scientific value.

2. Community standards are applied, per **Miller,** supra in determining whether certain types of materials, films, or books are obscene under the standards of valid state statutes. In **City of Tallmadge v. Chapman,** No. 9140 (Dist. Ct. App. July 18, 1979), that Court of Appeals opined that a jury of community members had, at trial, found the materials sold by defendant Chapman at the Book Store to be obscene under Ohio law. Review of the opinion from **Chapman,** supra, leaves no doubt that the evidence reviewed by that jury was so similar to the evidence reviewed here as to be identical in form and content. In **Chapman,** supra, it was affirmed that the **Miller** guidelines had been properly applied. On these bases and in light of evidence of community standards in the instant case, it has been clearly shown that the defendant book store has maintained the sale of obscene materials.

This present case gives rise to the third determination by a Court of competent jurisdiction that defendant disseminates obscene materials from its present location.

3. A Court of Equity has jurisdiction to restrain a public nuisance where there is interference with property rights or danger to public health, morals, safety or welfare, and an injunction may issue to protect the public from irreparable injury. **State ex rel. Chalfin v. Glick,** 172 Ohio St. 249, 175 N. E. 2d 68 (1961). The court of general jurisdiction has the ingerent power to enjoin or modify common-law nuisances which interfere with the rights of others. **Dale v. Bryant,** 75 Ohio Law Abs. 401, 141 N. E. 2d 504 (C.P. 1957). In order to obtain an injunction in a nuisance case, the nuisance must be clearly established. **Goodal v. Crofton,** 33 Ohio St. 271 (1877). It is noted that a public nuisance may be enjoined although the acts which constitute the nuisance are also violations (including criminal violations) of the Revised Code. **Grosser v. Woollett,** 45 Ohio Misc. 15, 341 N. E. 2d 356 (C. P. 1974).

This Court has the inherent equity power to enjoin a commonlaw nuisance. As discussed above, evidence reviewed in the instant case clearly establishes the existance of a nuisance that is a danger to the public morals and to the community welfare. It is in keeping with the character of the City of Tallmadge that it would wish to purge itself of nuisances detrimental to the community. Injunctive relief fashioned to protect the public is the proper remedy.

WHEREFORE, IT IS SO ORDERED THAT:

the prior judgment entry and Court Order directing the rear portion of defendant's store closed shall be complied with by the parties immediately.

JUDGE FRED V. SKOK

cc:
Frederick W. Lawrence, Esq.
Attorney for Plaintiff

George W. Palda, Esq.
Attorney for Defendant

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Lois Chapman,
Petitioner-Appellant

v.

Anthony J. Cardarelli,
Sheriff of Summit County,
Ohio;
William Pike, Judge
Municipal Court, Cuyahoga
Falls, Ohio,
Respondents-Appellees

No. 81-3202

Order

Filed March 4, 1982 John P. Hehman, Clerk
Received March 9, 1982 Law Director's Office

Before: Kennedy and Martin, Circuit Judges;
and Cecil, Senior Circuit Judge.

This habeas corpus petitioner appeals the denial of her writ alleging the unconstitutionality of the criminal obscenity ordinances under which she was convicted. Her challenge to the City of Tallmadge ordinances claims that they are unconstitutionally overbroad and vague. She also challenges her conviction because the prosecution failed to present at trial expert witnesses who could testify to the obscene materials appeal to the prurient interest of the deviant group to which the subject material was directed.

Because the Tallmadge obscenity ordinances mirrors almost identically the Ohio state obscenity statute, we have held this case until the constitutionality of that statute could be decided by another

panel of this court. That decision, **Turso, et al. v. Cleveland Municipal Court, et al.**, Nos. 80-3696, etc. (February 4, 1982), has been reported. There the Ohio obscenity statutes were adjudged constitutional. The Tallmadge ordinances, being more tightly drafted and so more protective of the First Amendment than the Ohio statute, are therefore constitutional as well. Hence petitioner's first argument must fail.

Furthermore, petitioner was not convicted on the basis of insufficient evidence. **See Jackson v. Virginia,** 443 U. S. 307 (1979). The facts of this appeal do not present the extreme case noted at footnote 6 to the court's opinion in **Paris Adult Theatre I v. Slaton,** 413 U. S. 49 (1973). Instead the subject matters of the materials here, nudity, sexual intercourse, and oral sex, are not so far removed from the realm of average human experience that the jury could be said to have been incapable of reaching a fair verdict without the aid of expert testimony.

The judgment of the lower court is affirmed.

ENTERED BY ORDER OF THE COURT

Clerk

OHIO REVISED CODE

[INDIRECT]

2705.02 Acts in contempt of court. (GC 12137)

A person guilty of any of the following acts may be punished as for a contempt:

(A) Disobedience of, or resistance to, a lawful writ, process, order, rule, judgment, or command of a court or an officer;

(B) Misbehavior of an officer of the court in the performance of his official duties, or in his official transactions:

(C) A failure to obey a subpoena duly served, or a refusal to be sworn or to answer as a witness, when lawfully required.

(D) The rescue, or attempted rescue, of a person or of property in the custody of an officer by virtue of an order or process of court held by him;

(E) A failure upon the part of a person recognized to appear as a witness in a court to appear in compliance with the terms of his recognizance.

***2705.03 Hearing (GC * 12138)**

In cases under section 2705.02 of the Revised Code, a charge in writing shall be filed with the clerk of the court, an entry thereof made upon the journal, and an opportunity given to the accused to be heard, by himself or counsel. This section does not prevent the court from issuing process to bring the accused into court, or from holding him in custody, pending such proceedings.

2705.04 Right of accused to bail. (GC§§12139, 12140)

In proceedings under section 2705.02 of the Revised Code, if the writ is not returnable forthwith, the court may fix the amount of a bond to be given by the accused, with surety to the satisfaction of the sheriff. Upon the return of a writ, when it is not convenient to hear the charge without delay, the court shall fix the amount of a bond to be given, with surety to the satisfaction of the clerk of the court, for the appearance of the accused to answer the charge.

On the execution of such bond, the accused shall be released from custody.

[TRIAL PUNISHMENT]

***2705.05 Trial.** (GC **12141, 12142)

Upon the day fixed for the trial in a contempt proceeding the court shall investigate the charge, and hear any answer or testimony which the accused makes or offers.

The court shall then determine whether the accused is guilty of the contempt charge. If it is found that he is guilty, he may be fined not more than five hundred dollars or imprisoned not more than ten days, or both.

[APPEAL]

§2705.09 Judgment final. (GC § 12146)

The judgment and orders of a court or officer made in cases of contempt may be reviewed on appeal. Appeal proceedings shall not suspend execution of the order or judgment until the person in contempt files a bond in the court rendering the judgment, or in the court or before the officer making the order, payable to the state, with sureties to the acceptance of the clerk of that court, or a judge thereof, conditioned that if judgment is rendered against such person he will abide by and perform the order or judgment.

IN GENERAL

'2907.01 Definitions.

As used in sections 2907.01 to 2907.37 of the Revised Code:

(A) "Sexual conduct" means vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

(B) "Sexual contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

(C) "Sexual activity" means sexual conduct or sexual contact, or both.

(D) "Prostitute" means a male or female who promiscuously engages in sexual activity for hire, regardless of whether the hire is paid to the prostitute or to another.

(E) Any material or performance is "harmful to juveniles," if it is offensive to prevailing standards in the adult community with respect to what is suitable for juveniles, and if any of the following apply:

(1) It tends to appeal to the prurient interest of juveniles;

(2) It contains a display, description, or representation of sexual activity, masturbation, sexual excitement or nudity;

(3) It contains a display, description, or representation of bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) It contains a display, description, or representation of human bodily functions of elimination;

(5) It makes repeated use of foul language;

(6) It contains a display, description, or representation in lurid detail of the violent physical torture,

dismemberment, destruction, or death of a human being;

(7) It contains a display, description, or representation of criminal activity that tends to glorify or glamorize the activity, and that, with respect to juveniles, has a dominant tendency to corrupt.

(F) When considedred as a whole, and judged with reference to ordinary adults or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to that group, any material or performance is "obscene" if any of the following apply:

(1) Its dominant appeal is to prurient interest;

(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way that tends to represent human beings as mere objects of sexual appetite;

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way that inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral, or artistic purpose;

(5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such an interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose.

(G) "Sexual excitement" means the condition of

human male or female genitals when in a state of sexual stimulation or arousal.

(H)"Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

(I) "Juvenile" means an unmarried person under the age of eighteen.

(J) "Material" means any book, magazine, newspaper, pamphlet, poster, print, picture, figure, image, description, motion picture film, phonographic record, or tape, or other tangible thing capable of arousing interest through sight, sound, or touch.

(K) "Performance" means any motion picture, preview, trailer, play, show, skit, dance, or other exhibition performed before an audience.

(L) "Spouse" means a person married to an offender at the time of an alleged offense, except that such person shall not be considered the spouse when any of the following apply:

(1) When the parties have entered into a written separation agreement authorized by section 3103.06 of the Revised Code;

(2) During the pendency of an action between the parties for annulment, divorce, dissolution of marriage, or alimony:

(3) In the case of an action for alimony, after the effective date of the judgment for alimony.

2907.32 Pandering obscenity.

(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

(1) Create, reproduce, or publish any obscene material, when the offender knows that such material is to be used for commercial exploitation or will be publicly presented, or when he is reckless in that regard;

(2) Exhibit or advertise for sale or dissemination, or sell or publicly disseminate or display any obscene material;

(3) Create, direct, or produce an obscene performance, when the offender knows that it is to be used for commercial exploitation or will be publicly presented, or when he is reckless in that regard.

(4) Advertise an obscene performance for presentation, or present or participate in presenting an obscene performance, when such performance is presented publicly, or when admission is charged;

(5) Possess or control any obscene material with purpose to violate division (A)(2) or (4) of this section.

(B) It is an affirmative defense to a charge under this section that the material or performance involved was disseminated or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in such material or performance.

(C) Whoever violates this section is guilty of pandering obscenity, a misdemeanor of the first degree. If the offender has previously been convicted of a violation of this section or of section 2907.31 of the Revised Code, then pandering obscenity is a felony of the fourth degree.

CODE OF ORDINANCES OF THE CITY OF TALLMADGE, OHIO

Chapter 76: Public Morality

Section 76.1 ..... Definitions
Section 76.2 ..... Corruption of a Minor
Section 76.3 ..... Sexual Imposition
Section 76.4 ..... Importuning
Section 76.5 ..... Voyeurism
Section 76.6 ..... Public Indecency
Section 76.7 ..... Procuring
Section 76.8 ..... Soliciting
Section 76.9 ..... Prostitution
Section 76.10 ..... Disseminating matter harmful to Juveniles
Section 76.11 ..... Pandering obscenity
Section 76.12 ..... Deception to obtain matter harmful to Juveniles
Section 76.13 ..... Presumption of Knowledge
Section 76.99 ..... Penalties

Section 76.1: Definitions

As used in sections 76.1 to 76.99 of the Tallmadge City Code of Ordinances:

(A) "Sexual Conduct" means vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

(B) "Sexual Contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if such person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

(C) "Sexual Activity" means sexual conduct or sexual contact, or both.

(D) "Prostitute" means a male or female who promiscuously engages in sexual activity for hire, regardless of whether the hire is paid to the prostitute or to another.

(E) Any material or performance is "Harmful to Juveniles," if it is offensive to prevailing standard in the local adult community with respect to what is suitable for juveniles, and if any of the following apply:

(1) It tends to appeal to the prurient interest of juveniles.

(2) It contains a display, description, or representation of sexual activity, masturbation, sexual excitement, or nudity;

(3) It contains a display, description, or representation of bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) It contains a display, description, or representation of human bodily functions of elinination;

(5) It makes repeated use of foul language.

(6) It contains a display, description, or representation in lurid detail of the violent physical torture, dismemberment, destruction, or death of a human being;

(7) It contains a display, description, or representation of criminal activity which tends to glorify or glamorize such activity, and which with respect to juveniles has a dominant tendency to corrupt.

(F) When considered as a whole, applying local community standards, and judged with reference to ordinary adults, or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to such group, any material or performance is "Obscene" if the following apply:

(1) Its dominant appeal is to prurient interest; and

(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation sexual excitement, or nudity in a way which tends to

represent human beings as mere objects of sexual appetite; or

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality; or

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way which inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral, or artistic purpose; and

(5) When taken as a whole, it lacks serious literary, artistic, political or scientific value.

(G) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(H) "Nudity" means the showing, representation, or depiction of human male or female genitals, public area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opague covering of any portion thereof below the top of the nipple, or of covered male genitals in a dicernibly turgid state.

(I) "Juvenile" means an unmarried person under the age of eighteen.

(J)"Material" means any book, magazine, newspaper pamphlet, poster, print, picture, figure, image, description, motion picture film, phonographic record or take, or other tangible thing capable of arousing interest through sight, sound, or touch.

(K) "Performance" means any motion picture, preview trailer, play, show, skit, dance, or other exhibition performed before an audience.

Section 76.11 - Pandering Obscenity

(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

(1) Create, reproduce, or publish any obscene material, when the offender knows that such material is to be used for commercial exploitation or will be publicly disseminated or displayed, or when he is reckless in that regard;

(2) Exhibit or advertise for sale or dissemination, or sell or publicly disseminate or display any obscene material;

(3) Create, direct, or produce an obscene performance, when the offender knows that it is to be used for commercial exploitation or will be publicly presented, or when he is reckless in that regard;

(4) Advertise an obscene performance for presentation, or present or participate in presenting an obscene performance, when such performance is presented publicly, or when admission is charged;

(5) Possess or control any obscene material with purpose to violate division (A), (2) or (4) of this section.

(6) Exhibit obscene material by movie, film or other commercial manner which may be observed by persons, whether minor or adult, who have not by their own choosing entered an enclosed building wherein the same are being depicted.

The exhibition of any such obscene material upon any location not completely within an enclosed building shall be prima facie evidence of the violation of this section.

(B) It is an affirmative defense to a charge under this section, that the material or performance involved was disseminated or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person

pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in such material or performance.

(C) This section shall not apply if the offender has previously been convicted of a violation of this section or of section 76.10 of the Tallmadge City Code of Ordinances, or a violation of Section 2907.31 or 2907.32 of the Ohio Revised Code.

(D) Whoever violates this section is guilty of pandering obscenity, a misdemeanor of the first degree.

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